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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-845

ALAMEDA COUNTY WATER DISTRICT,
Petitioner

vs.

TEJPAL S. SETHY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM OPPOSING CERTIORARI

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Petitioner presents no issue worthy of Supreme Court review. This Court has already determined in *Hutto v. Finney*, 437 U.S. 678 (1978) that the Civil Rights Attorneys' Fees Awards Act applied retroactively and has discussed the principles of such retroactive application in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).[1] Petitioner

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[1]In *Bradley*, this Court stated that a case was to be considered as "pending" for purposes of retroactivity until "the availability of appeal has been exhausted *or* has lapsed, and the time to petition for certiorari has passed." 416 U.S. at 711, n.14.

cannot point to any Circuit Court decisions which conflict with the Ninth Circuit decision herein. Moreover, this case presents a peculiar procedural sequence that is unlikely to occur again. Thus, no purpose would be served by this Court's review.

Petitioner's assertion that the Ninth Circuit decision conflicts with this Court's decision on retroactivity represents an attempt to create conflict where none exists. The two Supreme Court cases upon which petitioner relies, *Bradley* and *Hutto,* authorized awards of attorneys' fees and favorably established the principle of retroactive application of attorneys' fees statutes to pending cases. Neither decision rejected that principle. Neither decision created any exception to that principle which would prohibit an award. These cases therefore fully support the Ninth Circuit decision.

Petitioner's assertion that the Ninth Circuit decision is contrary to, or unsupported by, the legislative history of the Act is also manifestly incorrect. That history is replete with statements requiring retroactive application.[2] Not a single statement negates that principle or provides a restriction enabling an exception in this case. Thus, this case is a stronger case for retroactive application than was *Bradley* where Congress had remained silent on retroactivity.

[2]*E.g.*, H.R. Rep. No. 94-1558, 94th Cong.2d Sess., p. 4, n.6, (1976); 122 Cong. Rec. 12160 (Representative Drinan, October 1, 1976); 122 Cong. Rec. 33314 (Senator Abourezk, October 1, 1976); 122 Cong. Rec. 35118 (Representative Anderson, October 1, 1976). A motion on the floor of the House to make the Bill prospective in application was also resoundingly defeated. 122 Cong. Rec. 12166 (October, 1976).

Finally, petitioner urges that a pre-Act determination on fees by the District Court precluded its subsequent consideration of an award under the Act. Petitioner neither raised this argument before the District Court, nor before the Ninth Circuit. Thus, this Court's review of that issue for the first time would be inappropriate, particularly since review would include an interpretation of the lower court's orders and of the Act's legislative history in light of the particular facts of this case, both of which should be done initially by the lower courts. Review would be inappropriate for the further reason that there is no conflict on this issue between the Ninth Circuit and any other Circuit.[3] Indeed, the issue has not even been considered by the Circuit Courts.

CONCLUSION

This is precisely the type of case in which attorneys' fees should be awarded under the Act. The legislative history specifies that the Act covers employment discrimination cases brought under 42 U.S.C. § 1981.[4] The facts of discrimination were sufficiently egregious to merit a jury award of $35,000 in damages in addition to reinstatement. Respondent prevailed, not only at trial, but also in a far reaching *en banc* decision on the merits by the Ninth Cir-

[3]The only Circuit Court decision cited by petitioner, *Du Buit v. Harwell Enterprises, Inc.*, 540 F.2d 690 (4th Cir. 1976), is irrelevant. In *Du Buit,* fees were sought subsequent to a final Circuit Court decision under a statute which was in full force and effect throughout the litigation. Thus, no retroactivity issue was present. Rather, the court held that fees should have been requested before a final order was issued.

[4]*E.g.*, S. Rep. No. 94-1101, 94th Cong. 2d Sess., pp. 3, 4, 6 (June 29, 1976); H. Rep. No. 94-1558, 94th Cong. 2d Sess., p. 4 (Sept. 15, 1976).

cuit and then a unanimous decision by the Ninth Circuit on attorneys' fees. The legislative history emphatically notes that the important right to be free from discrimination could be rendered meaningless without an award of fees in cases such as this.[5]

Petitioner has raised no important question of law. Petitioner presented no cases in conflict with the Ninth Circuit decision. Indeed, the cases and legislative history discussed by petitioner provide strong support for the Ninth Circuit decision.

For the foregoing reasons, the petition for certiorari should be denied.

Dated: December 17, 1979.

Respectfully submitted,

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[5]*E.g.*, S. Rep. No. 94-1101, 94th Cong. 2d Sess., p. 2 (June 29, 1976).